NOT TO BE PUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LINDA L. HENRICH, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C02-4006-MWB **REPORT AND RECOMMENDATION**

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TABLE OF CONTENTS

I. INTRODUCTION

The plaintiff Linda L. Henrich ("Henrich") appeals the decision by an administrative law judge ("ALJ") denying her Title II disability income ("DI") benefits. Henrich argues the ALJ erred in rejecting the opinions of consultative examiners and other evidence of record, with the result that the Record does not contain substantial evidence to support the ALJ's decision. (*See* Doc. N. 10)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On February 3, 2000, Henrich filed an application for disability benefits, alleging a disability onset date of October 1, 1999.[1] The application was denied initially on April 12, 2000 (R. 12, 178, 180-83), and on reconsideration on June 29, 2000 (R. 12, 179, 185-89). Henrich requested a hearing (R. 190-91), which was held before ALJ Virgil Vail in Spencer, Iowa, on June 19, 2001. (R. 30-74) Attorney David Scott represented Henrich at the hearing. Henrich testified at the hearing, as did her husband, Steven Henrich. Vocational Expert ("VE") William Tucker also testified at the hearing.

On July 26, 2001, the ALJ ruled Henrich was not entitled to benefits. (R. 9-25) The Appeals Council of the Social Security Administration denied Henrich's request for review on December 12, 2001 (R. 5-6), making the ALJ's decision the final decision of the Commissioner.

Henrich filed a timely Complaint in this court on February 7, 2002, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447,

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[1]Henrich's claimed disability arises from an on-the-job injury she sustained on March 23, 1996. She filed a prior application for benefits based on the same claimed disability. After a hearing, her prior application was denied initially and on reconsideration (*see, e.g.*, R. 155-77), and that application is not part of the present appeal. In this Report and Recommendation, the court will discuss Henrich's physical complaints and medical records prior to October 1, 1999, to provide a context for her current application.

dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Henrich's claim. Henrich filed a brief supporting her claim on August 23, 2002 (Doc. No. 10). After receiving an extension of time from the court, the Commissioner filed a responsive brief on October 30, 2002 (Doc. No. 12). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Henrich's claim for benefits.

B. Factual Background

1. Introductory facts and Henrich's daily activities

At the time of the hearing, Henrich was 46 years old, and living in Arnold's Park with her husband of seven years, Steven. She drives occasionally, but Steven drove her to the hearing. She stated riding in a car is "very, very uncomfortable" for her. (R. 33) The trip to Spencer from Arnold's Park is about 20 miles, and riding even that distance caused her some pain in the side of her left leg down to her calf, all across her lower back, and in her buttocks. (R. 33-34) To control her pain, Henrich takes pain medications and uses a TENS unit. She stated the TENS unit helps somewhat, but "not a lot." (R. 35) She sometimes uses a back brace, but it cuts into the sore spot on her back. (R. 40)

Henrich completed the ninth grade in school. She can read a kindergarten-level children's book, but stated she cannot read and understand a newspaper article. The only schooling or training she has had since high school was to become a certified nursing assistant. The nursing assistant test was read to her. (R. 35-36) She can write, but does not write letters, and she would be unable to write down directions in the workplace and follow them. (R. 50-51)

Prior to hurting her back at work, Henrich's health had been good. She hurt her back at the Sioux Care Center in Sioux Rapids, in March 1996. (R. 36) Her employer sent her

to "several doctors," beginning with a chiropractor in Sioux Rapids. The next doctor she saw was a Dr. Gomosh in Storm Lake, and then J. William Follows, M.D. in Spencer. Next, the workmen's compensation carrier sent her to J. Michael Donohue, M.D. in Spirit Lake. (R. 37)

Henrich saw Dr. Donohue's partner, Alexander Pruitt, M.D., about a month prior to the hearing. He gave her some medication, and recommended she have an MRI to determine whether she has a pinched nerve. (R. 38, 50) Henrich filled out an application with Dickinson County to obtain payment for the MRI, but she had not received any response to her application by the hearing date. (R. 38) Henrich has not had any surgery. She had epidural floods and injections, but got little relief from those. (R. 50)

Dr. Harlan Payne performed an EMG study on Henrich's legs a few weeks before the hearing. The test did not show any nerve damage; however, Dr. Pruitt told her that he still believed there was "some damage in there," and an MRI would show the damage. (R. 39)

Henrich's understanding of her 1996 injury was that "the fourth and fifth lumbar are swollen. And they're rubbing up against each other." (*Id.*) She stated she does not have any pain on her right side, but her left side "hurts all the time. (R. 40) The pain goes all across her back, down her left buttocks, down her left lateral thigh, and occasionally into the left calf and down into her ankle. If she stands long enough, she gets numbness and weakness in her left leg. Her pain also is aggravated by sitting for prolonged periods, and by walking. The longest she can walk without pain is one block. (R. 40-41)

Henrich believed her condition had worsened in the year preceding the hearing, and in particular since her functional capacity evaluation in December 2000. (R. 41, 54) She stated her "pain is a lot worse than it used to be." (R. 41) She is unable to stoop, climb, kneel or crawl. She sits down to dress herself. She has a 30-pound lifting restriction, but

stated she cannot lift that much. She can lift a gallon of milk, but uses her other hand for support on the bottom of the container. (R. 42-43)

Dr. Donohue sent Henrich to physical therapy sometime in 1998, but she and the doctor quickly recognized she could not handle the therapy. (R. 49-50) That was the last time she tried any type of therapy. (R. 50) At the time she left Dr. Donohue's care, she had a 30-pound lifting restriction, and was told to avoid repetitive bending and lifting. No doctor ever modified those restrictions subsequently. (R. 62)

Henrich also suffers from bowel problems, as well as migraine headaches. She wakes up with a headache about once a week. The headaches make her very light-sensitive, and she will put "a rag or something" over her eyes. (R. 43) Timothy J. Taylor, D.O., a doctor Henrich saw at an emergency room visit in February 1997, told Henrich that her headaches were probably related to her back pain. (R. 44, 46; *see* R. 117-18) Another doctor, David P. Robison, D.O., suggested Henrich's headaches are due to muscle tension triggered by chronic low back pain. (R. 46) At the time of the hearing, she was taking Mylan for her headaches. She stated Dr. Pruitt had given her samples of Ultram because she could not afford a prescription, and when she ran out of the samples, the doctor gave her a prescription for Mylan, which is inexpensive in generic form. (R. 44-45) Henrich stated the Mylan makes her drowsy. (R. 44)

Henrich wears glasses, and cannot see well without them. Her eyes are sensitive to light, and her lenses are tinted. Sun and snow bother her eyes. (R. 51-52)

Henrich described her typical day as starting with a hot bath. She will then "sit down for a little while," noting she gets up and down a lot because she is unable to sit for very long at a time. She and her husband live in a sixteen-foot by eighty-foot mobile home, and she will walk around as much as she can in that space, then sit again, and continue to alternate sitting and standing throughout the day. Sometimes she puts ice on her back to

relieve the pain. (R. 46-47) Her husband does the vacuuming, makes the bed, and does most of the cooking. (R. 51)

She stated she suffers from depression due to her pain, but she was not taking medication for the depression. Dr. Pruitt did not want her to take antidepressants along with pain medication. (R. 47) Henrich stated she does not sleep well, waking up "about every other hour." (*Id.*) When she wakes up, she will go to the bathroom, get a drink of water, walk around a bit, and sometimes take a Tylenol PM. (R. 48)

Henrich had a worker's compensation claim in connection with her 1996 injury, that she settled in October 1999. (R. 52) She netted about $9,000 from that claim. (R. 57) She quit seeing a doctor after the worker's comp case was settled because she had no insurance and could not afford doctor visits. (*Id.*)

In discussing her work history, Henrich stated she made $10,000 in 1998, working part-time at the nursing home. She made the beds, fed residents, and took their temperatures. She worked from 7:00 a.m. to 11:00 a.m. (R. 57-58, 60) She quit working there when her husband got a full-time job with Smith Homes in 1999, because she could not afford to continue driving to Sioux Rapids to work. (R. 60) In 1999, she made $6,000, from a part-time job mowing at the mobile home park where she lives. (R. 58)

Henrich could not think of any jobs she could do considering her pain, and the fact that she cannot read or use a calculator. (R. 47) She does not have much strength. The last job she tried to do was in October 1999, when she tried to help her husband with his lawn business. She stated she had to quit because the work was too hard on her, despite the fact that she used a riding mower. She could ride the mower for up to half an hour before the pain became too much for her. (R. 48-49) When the ALJ pointed out that Henrich had told Dr. Mayhew, in May 2000, that she was working part-time mowing lawns for Smith Homes, she stated she "might have been working a very little bit." (R. 61; *see* R. 290)

Henrich's husband, Steven Henrich ("Steven"), confirmed that Henrich has to get up and down frequently. She uses ice packs, and puts pillows between her legs. She tosses and turns a lot and has trouble sleeping. She also has trouble walking more than short distances. Steven stated that since 1996, when Henrich was injured at work, she had "slowed down quite a bit." (R. 63)

Steven stated Henrich worked some in 2000, doing part-time mowing to help Steven out with his job. He stated his wife quit because she could not handle running the mower, or bending over and picking up sticks. (R. 64-65) With Henrich no longer being able to help with the mowing work, Steven has hired other people to handle the work. (R. 66) Steven stated he has no health insurance at his job. His wife had to quit her job because they could not afford to buy a second vehicle for her to drive to Sioux Rapids, together with the cost of insurance and gas. (R. 67) Before Henrich quit working at the nursing home, she was only working a few days a week. When Steven's job was close by, he would drive Henrich to work, or drop her off at her mother's and her parents would take her to work. She was only working four to six hours a day, two or three days a week. (R. 68)

2. Henrich's medical history

A detailed chronology of Henrich's medical history is attached to this opinion as Appendix A. The Record substantiates her claim that she suffered a work-related injury to her back in the spring of 1996. For the first three months following the accident, Henrich saw Arden Keune, D.C. for regular chiropractic adjustments. She saw Dr. Keune four times in April, seven times in May, and twice in June of that year. In August 1996, after the chiropractic adjustments had failed to provide her with relief, Henrich began seeing J. William Follows, M.D., at Northwest Iowa Bone, Joint and Sports Surgeons, P.C. Dr. Follows performed epidural blocks on August 29 and September 10, 1996. Henrich returned to work on September 16, 1996, per the doctor's orders. When she saw Dr. Follows for

follow-up on September 19, 1996, Henrich reported her back was still sore and she did not feel the epidurals had helped her any. The doctor recommended conservative treatment including continued exercise and anti-inflammatories, and gave her a work release for three weeks.

Becky Oster, a representative of Henrich's employer, called Dr. Follows's office on September 23, 1996, and reported the center was willing to offer Henrich light-duty work and a "sit down" job. A nurse explained sit-down work was "not satisfactory for this patient," and read Ms. Oster "the portion of Dr. Follows['s] last dictation, which outlines the rationale for [Henrich] staying off work for three weeks." (R. 297) The nurse talked with Henrich about the possibility of working two- to four-hour shifts, but Henrich was "adamantly opposed to doing this, as she is driving from Arnolds Park to Sioux Rapids and she says it wouldn't pay for her to do that." (*Id.*) In addition, Henrich would be in a car for nearly an hour each way, "which may or may not comply with her restrictions that Dr. Follows outlined" on September 19th. (*Id.*)

On September 25, 1996, Henrich saw Dr. J.M. Donohue at the request of Sioux Care Center's workmen's compensation insurer. Henrich told Dr. Donohue that she had left leg pain, low back pain, and numbness in her lower back with prolonged sitting. She stated her pain was "aggravated by standing, walking, sitting, driving, at night, bending, lifting, getting up from a chair, doing housework, coughing and sneezing." (R. 284) She obtained some relief from aspirin, ice and exercise, but overall, she rated her pain at 10 on a scale of 10. Dr. Donohue found Henrich had "significant residual lumbar dysfunction" as a result of her low back injury, but "no evidence of a surgical lesion on examination or review of her MRI scan." (R. 282) The doctor recommended an "aggressive strengthening program" for Henrich's back, which would entail physical therapy three times per week for six to eight weeks, "with goals of maximal strengthening of the lumbar musculature and maximizing endurance." (*Id.*) He recommended Henrich stay off work for two weeks, and

then return on light-duty status, and he noted Henrich's prognosis for improvement was "quite good." (*Id.*)

At a follow-up visit on October 9, 1996, Dr. Donohue prescribed continued physical therapy three times per week, and continued Henrich's work release for two more weeks. After that time, she could return to work for four hours per day, with a 20-pound lifting restriction, change of positions as necessary, and instructions to avoid repetitive bending, lifting, and twisting. (R. 281) Henrich called Dr. Donohue on October 18, 1996, and reported her symptoms were increasing. The doctor noted, "[B]ased on her previous work-up, I know of no further treatment options for her other than continuing with rehab." (R. 280) When Henrich expressed concern about returning to work, the doctor responded that "it would be in her best interest to return to part-time light duty work after her next follow-up visit." (*Id.*)

Henrich saw Dr. Donohue for follow-up on October 21, 1996, "after 4 weeks of aggressive rehab." (R. 279) Henrich's physical therapist had told Dr. Donohue that Henrich "had a significant decrease with respect to her rehab efforts. She underwent repeat testing and for the most part, demonstrates significant drop in peak torque production and strength." (*Id.*) Dr. Donohue found Henrich to have a normal gait; forward flexion of 60 degrees; hyperextension of 20 degrees; and lateral flexion of 20 degrees in each direction. He noted Henrich "jerks and grimaces at maximal [range of motion]." (*Id.*) She had "a positive pain response to torso rotation"; neck pain and mild lower back discomfort with cervical compression; and discomfort with pressure over her shoulders. Straight-leg-raising was negative to 90 degrees on the right and left, but she reported pain at 25 to 30 degrees on the left and at 80 degrees on the right. Dr. Donohue's notes indicate, "It should be noted that the patient lies down and sits up directly with minimal use of her upper extremities which is inconsistent with significant back dysfunction." (*Id.*) The doctor told Henrich "certain findings including her torso rotation data [are] extremely inconsistent with [her]

observed capabilities. . . . Furthermore, the significant drops that she demonstrates in my opinion can only be interpreted as the patient giving a less than maximal effort." (*Id.*)

Dr. Donohue made the following assessment from his October 21st evaluation of Henrich:

> Status post alleged low back injury – significant symptom magnification on exam today – subjective complaints far outweigh the objective findings. The patient had previously contacted me last week discussing difficulty with respect to return to work because of transportation problems. I relayed to the patient that at this point, she is not giving a consistent effort in rehabilitation. Therefore, rather than continuing with rehab at this point, my recommendation would be to transition her to work activities through a work hardening approach. Specifically, I recommended that she follow work restrictions including:
>
> ***1) Avoid repetitive bending and lifting.***
> ***2) Change position as necessary.***
> ***3) A thirty (30) pound lifting restriction.***
>
> I recommended the patient return to work for 4 hours a day and then increase her time at work by one hour each week over the next 2 weeks.
>
> I relayed to the patient that she may make beds intermittently and pass trays. The patient is asking today what she can do about her current pain. I relayed to her that other than working on a home exercise program, I know of no further treatment options for her. She asked me to put in writing that I do not feel it is unusual that she will continue to have pain and will need to put [up] with her discomfort as she transitions back to work activities.
>
> The patient is instructed to continue on her home exercise activities. At time of follow-up in 2 weeks, we will reevaluate her clinically. Prognosis remains guarded based on findings at this point.

(R. 279-78; emphasis in Record)

Henrich saw Dr. Keune on October 24, 1996, for a chiropractic adjustment. She was still complaining of left leg pain, and also complained of a stiff neck. (R. 134) She returned to see Dr. Donohue for reevaluation on November 6, 1996, accompanied by her husband. She had returned to part-time work, and was working six hours a day. She reported ongoing significant pain that radiated down her left leg, "largely unchanged over its initial status." (R. 277) Dr. Donohue once again noted Henrich would lie down and sit up without using her upper extremities, which he found to be "inconsistent with significant back dysfunction." (*Id.*) She had a negative straight-leg-raising test while sitting, but a positive test while supine, and a positive Hoover test.[2] These results, together with the doctor's failure to find objective physiological signs to support Henrich's complaints (*i.e.*, positive "Waddell findings"), suggested Henrich might be exaggerating her symptoms, and Dr. Donohue again noted her "subjective symptoms far outweigh the objective findings." (R. 277-76)

The doctor discussed his findings with Henrich and her husband, and explained that the only treatment he could recommend would be to continue her home exercise program, and increase her hours at work to seven hours per day for one week, and then eight hours per day the following week. He told Henrich she would "need to make a decision on whether she wants to continue with work as a nursing aid versus considering other occupational pursuits." (R. 276) He noted further, "I do not believe she will physically harm herself by returning to nursing assistant activities. Prognosis remains extremely guarded based on positive Waddell findings in 5 of 5 areas tested today." (*Id.*)

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[2]In the Hoover test, the doctor will place a hand under the patient's opposite heel during straight-leg-raising. A patient who is genuinely trying to raise his/her leg will put pressure on the heel of the opposite leg to gain leverage, and the doctor can feel downward pressure on the hand under the heel. *See* C.R. Wheeless, *Textbook of Orthopaedics*, http://www.ortho-u.net/o11/20.htm (visited 04/25/03).

Dr. Donohue's assessment remained unchanged at Henrich's next follow-up visit, on December 4, 1996. Henrich reported her "rehab specialist" recommended she work two days and then be off for one day, and told her to rest more. Dr. Donohue disagreed with this evaluation, and recommended Henrich increase her activities and attempts to return to full-time work. He "relayed to her that she does have some residual strength deficits but that she must bear some responsibility with respect to this condition with her decision not to pursue aggressive rehabilitation." (R. 274) The doctor suggested Henrich have a functional capacity evaluation ("FCE") "to arrive at some final recommendations with respect to her condition." (*Id.*) He recommended she continue with her current restrictions until after the FCE, and noted her prognosis continued to remain guarded. (*Id.*)

The FCE was performed by Dorothy Tank, OTR/L, on December 16, 1996. With respect to material handling activities, the evaluator found Henrich could leg lift at least 25 pounds occasionally, 12 pounds frequently and 5 pounds constantly; shoulder lift at least 23 pounds occasionally, 17 pounds frequently, and 5 pounds constantly; overhead lift at least 15 pounds occasionally, 13 pounds frequently, and 3 pounds constantly; carry at least 25 pounds occasionally, 13 pounds occasionally, and 5 pounds constantly; and push or pull at least 20 pounds occasionally, 10 pounds frequently, and 4 pounds constantly.[3] (R. 115) With respect to non-material-handling activities, the evaluator found Henrich frequently could sit, stand, reach, climb, squat, kneel, and crawl; occasionally could bend; and constantly could stand and walk, as long as she could alternate sitting, standing and walking positions as needed. (*Id.*)

The evaluator found Henrich to have no limitations in the hand function abilities of simple grasping, fine work, pushing and pulling, and low speed assembly. (*Id.*) The

[3]The categories utilized by the evaluator for material handling activities were occasional (33% of the day, or 1-32 repetitions per day); frequent (34-66% of the day, or 33-200 repetitions per day), and constant (67-100% of the day, or more than 200 repetitions per day). (*See* R. 115)

evaluator noted Henrich was qualified for full-time work in the light range, with the permanent restrictions noted. (*Id.*) Dr. Donohue concurred with the evaluator's assessment, except that he found Henrich was qualified for medium work, rather than light work, with the permanent restrictions noted. (R. 115-16, 273) He opined Henrich had reached "maximum medical improvement," and had not sustained any impairment. He expected Henrich's symptoms to resolve over time, and recommended she continue with her home exercise program. (R. 273)

On February 1, 1997, Henrich went to the emergency room complaining of a headache and nausea. Timothy Taylor, D.O. diagnosed a possible migraine headache, but noted he could not rule out sinusitis. He prescribed Toradol and Ultram, and noted a CT might be indicated if the medications did not relieve Henrich's symptoms. (R. 117-18) Henrich saw Dr. Keune on February 4, 1997, still complaining of headaches. Also on February 4, 1997, Henrich saw Dr. Fellows for her back and left leg pain. She reported she was "now finished with Dr. Donahue [sic] and [was] not particularly happy." (R. 296) Henrich felt not much had been done for her pain, and she did not know "where to go from here." (*Id.*) Her pain had not improved over the preceding six months, and she continued to have pain in her lower back, left thigh, and lower leg into her foot. Dr. Follows noted an earlier MRI had shown some annular redundancy with L4 and L5 "touching against but not compressing the L-5 root on that side," but he noted Henrich had "enough indication for a chronic L 4-5 disc," and he therefore felt "some further workup should be done." (*Id.*) Dr. Follows referred Henrich to Alexander Pruitt, M.D. for a second opinion.

Henrich saw Dr. Pruitt on February 18, 1997. Dr. Pruitt noted some tenderness in the left sciatic notch of Henrich's buttock, and tenderness in her SI joints. He interpreted her previous MRI as showing "just a minimal disc bulge at 4/5 and no evidence of anything pushing on a nerve at that point." (R. 295) Dr. Pruitt noted Dr. Donohue's FCE had failed

to point out where Henrich has weakness in her back. Dr. Pruitt recommended Henrich try "a warm and form brace and TENS unit," to see if she could get some relief. (*Id.*) He also recommended trying to reproduce her symptoms with a discogram or selective nerve block. The doctor prescribed Darvocet N 100. (*Id.*) On March 14, 1997, Dr. Pruitt noted the TENS unit was providing Henrich with "real, real good relief as long as she is wearing it and the back brace makes her better." (R. 294) Henrich was told to continue using the brace and TENS unit, continue on the 30-pound lifting restriction, and return to the doctor as needed. (*Id.*)

When Henrich saw Dr. Pruitt again on May 19, 1997, she reported the TENS unit was relieving her pain, but the back brace had become a little uncomfortable. The doctor noted there was not much else he could offer Henrich, and he recommended she continue with the back brace and TENS unit. He noted, "I recommend going ahead and saying that this is probably what she will be left with." (R. 294) She was instructed to increase her activities as tolerated, return to the doctor as needed, and return for a follow-up in six months. (*Id.*)

David P. Robison, D.O. performed a consultative examination of Henrich on October 22, 1997, at the request of Disability Determination Services ("DDS"). (R. 120-24) He found Henrich to have "Mechanical low back pain with chronic low back pain with muscle tension headaches triggered from chronic low back pain"; "Inadequate treatment of her pain"; and "Mild depression secondary to chronic pain problems." (R. 121) He recommended she continue using the back brace and TENS unit, continue her exercise program, and follow up with her family physician for a trial of nonsteroidal anti-inflammatories or chronic pain medications. (R. 122) Dr. Robison noted, "I am mostly concerned with [Henrich's] depression, because she has been told that nothing else can be done and I do not feel that she has reached maximum medical therapeutics." (*Id.*)

On December 1, 1997, Henrich underwent a psychological evaluation by Steven B. Mayhew, Ph.D., at the request of DDS. (R. 128-30) Dr. Mayhew diagnosed Henrich with Major Depressive Disorder, single episode, mild; and Borderline Intellectual Functioning. He gave her a current GAF rating of 61, indicating mild symptoms or some difficulty with social and occupational functioning. (R. 129; *see* American Psychiatric Assoc., *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) ("DSM-IV") at 32) He found Henrich could remember and understand instructions, procedures and locations; she was pleasant and cooperative, although her mood was somewhat depressed; and she likely would be able to interact appropriately in the workplace with supervisors, coworkers, and the public. Dr. Mayhew found Henrich's ability to carry out instructions in terms of maintaining attention, concentration, and pace varied somewhat between her mental status examination and formal psychological testing, and he opined she would have a marginal ability to use good judgment and respond appropriately to changes in the workplace. He also opined Henrich would be able to manage benefits on her own behalf. (R. 128-30)

On January 28, 1998, Dennis A. Weis, M.D. performed a Physical Residual Functional Capacity Assessment of Henrich. (R. 75-84) He found her subjective pain complaints were not credible "based on her work activity which require[s] her to do activities such as walking, standing, bending, and lifting," and he gave her the following restrictions: she occasionally can lift/carry 20 pounds; climb ramps, stairs, ladders, ropes, and scaffolds; and balance, stoop, kneel, crouch, and crawl. She frequently can lift/carry 10 pounds; stand/walk about six hours in an eight-hour work day; and sit with normal breaks about six hours in an eight-hour workday. Other than these limitations, she can push or pull, including operation of hand and foot controls, and has no manipulative, visual, communicative or environmental limitations. (R. 75-84)

John C. Garfield, Ph.D., performed a Psychiatric Review Technique and a Mental Residual Functional Capacity Assessment of Henrich on February 2, 1998. (R. 85-99) He

found Henrich to have a slight restriction of the activities of daily living and social functioning, and frequent deficiencies of concentration, persistence or pace. He found her to be moderately limited in her ability to understand, remember, and carry out detailed instructions; complete a normal workday and work week without interruptions from psychologically based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; and respond appropriately to changes in the workplace. He further found her to have good short-term memory and concentration. Dr. Garfield concluded Henrich has a medically determinable impairment of mild depression, secondary to chronic pain, noting she "barely reaches a level of impairment severity determinable as a severe impairment[,] what with her borderline intellectual functioning and her mild depression secondary to pain." (R. 98) He found this conclusion to be in line with Dr. Mayhew's GAF assessment of 61, "which corresponds to a finding that the claimant is 'generally functioning pretty well." (*Id.*) Dr. Garfield disagreed with prior diagnoses of major depression, noting Henrich had not received treatment for depressive symptoms.

Dr. Garfield's formal testing indicated Henrich has a verbal IQ of 74, performance IQ of 83, and full-scale IQ of 78, which places her intelligence in the upper half of the borderline range. He noted Henrich "does her household chores, laundry, manages household finances, maintains a checking account. She plans and prepares meals, does the grocery shopping and other errands. She has a driver[']s license and drives herself around the community as needed." (R. 99)

Dr. Mayhew conducted another psychological evaluation of Henrich on April 1, 1998, again at the request of DDS. (R. 125-27) His evaluation was consistent with his prior evaluation in December 1997, discussed above. He rated Henrich's GAF at 64, and noted that throughout the evaluation, she "was able to remember and understand instructions, procedures, and locations," and had an adequate ability "to carry out instructions in terms of maintaining attention, concentration and pace." (R. 126)

David Schrodt, M.D. performed a disability examination of Henrich on June 1, 1998, at the request of DDS. (R. 131-33) Dr. Schrodt noted Henrich was 5'2" tall and weighed 166 pounds. She complained of chronic low back pain. She was "working part-time, no more than half time, making beds at the nursing home." The doctor noted, "It appears that the patient has lost any hope for improvement in her back pain," and he recommended she "repeat formal orthopedic evaluation to determine the etiology of her chronic back pain," with a view toward surgical intervention or more aggressive medication as indicated, together with weight loss and back strengthening exercises. He recommended Henrich "have [a] repeat MRI evaluation followed by appropriate formal back mobility and strength testing." (*Id.*)

Henrich underwent another Psychiatric Review Technique on June 20, 1998, by Dee E. Wright, Ph.D., in connection with Henrich's request for reconsideration of her Title II claim. (R. 100-08, 113-14) Henrich alleged her depression had worsened since the time of her primary application for benefits. Dr. Wright found Henrich's psychological reassessment of April 1998, did not "demonstrate evidence of severe decline in adaptive functioning from the psychological exam in 12/97." (R. 113) The doctor noted further, "Despite the claimant's allegation of a worsening of her depression[,] the objective medical evidence in file and behavioral evidence at reconsideration does not indicate this. . . . The claimant's allegation of a worsening of her depression is not credible at this point and is not supported by the medical evidence in file." (R. 113, 114) In connection with her current application for benefits, Henrich had another disability examination on February 29, 2000, this time by Ronald J. Creswell, M.D. (R. 285-86) She reported no improvement in her pain. She stated she has pain daily, and pain sometimes keeps her up at night. She reported ongoing pain from her back down through her left buttocks, left lateral thigh, and occasionally into her left calf and ankle. She stated if she stands on her left leg long enough, "she will develop numbness and weakness in that left leg. Sitting for prolonged

periods aggravates it and it is aggravated by walking. The maximum distance she can walk at a time is one block." (R. 285)

Dr. Creswell noted Henrich "walks without a limp," although she tends "to list just a little bit to the right." She has some difficulty walking on her right heel. Her lumbar spine X-ray was normal, and showed no arthritic changes or abnormal intervertebral disc spaces. (R. 287) The doctor diagnosed Henrich with chronic low back pain with left sciatica, migraine headaches, and abdominal pain likely resulting from constipation. Apparently based on Henrich's subjective complaints,[4] he concluded as follows:

> [Henrich] does have pain with walking, sitting and standing so that would certainly limit her ability to do any kind of work for an 8-hour day. She is absolutely unable to stoop, climb, kneel or crawl. She would have no trouble with handling objects. No trouble with seeing, hearing or speaking. She is unable to travel because of the back. No problems with dust. She does have trouble with some fumes such as ammonia or oven cleaners.

(R. 286)

Jan Hunter, D.O. performed a review of Henrich's medical records on April 8, 2000, at the request of DDS, and found Henrich had "failed to demonstrate a more than non-severe impairment." (R. 261) Dr. Hunter noted:

> The credibility of the claimant's allegations is significantly eroded by her failure to seek appropriate medical intervention. Furthermore, physical exam findings are minimal with the exception of decreased range of motion. Radiographic findings are entirely normal and are not supportive of the degree of restriction that this claimant alleges. The claimant's low back pain is unassociated with neurologic deficit with the exception of weakness on dorsiflexion of the left great toe.

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[4] Dr. Creswell noted he did not have Dr. Donohue's records available for review, and his report does not reflect that he reviewed Henrich's other medical records. (*See* R. 285-86)

(*Id.*) Dennis W. Weis, M.D. reviewed Dr. Hunter's findings on June 11, 2000, and concurred in the latter's conclusions. (R. 261)

Herbert Notch, Ph.D. performed a Residual Functional Capacity Assessment of Henrich on April 15, 2000, and found her to be moderately limited in her ability to carry out detailed instructions; maintain attention and concentration for extended periods; perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; complete a normal workday and workweek without interruptions from psychologically based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; set realistic goals; and make plans independent of others. He found her to have no other functional limitations. (R. 257-60)

Dr. Mayhew performed another psychological evaluation of Henrich on May 23, 2000. Henrich reported she got up around 7:00 a.m., and worked part-time, from 8:00 a.m. to around noon, mowing lawns for Smith Homes. She prepared meals, did her own laundry, and shopped for groceries with her husband. She continued to have a 30-pound lifting restriction. She reported pain across her lower back, shooting pain down her left leg, migraine headaches twice per week, and depression. (R. 290)

Dr. Mayhew diagnosed Henrich with a pain disorder with physical and psychological factors; depressive disorder, not otherwise specified; low back and left leg pain; migraine headache; and "Medical concerns." (R. 291) He gave her a current GAF of 50, indicating a serious impairment in her social and occupational functioning. (*See* DSM-IV at 32) Dr. Mayhew reached the following conclusions:

> [Henrich] is able to remember and understand simple instructions. She would probably be able to perform activities within a schedule. She would have some limitation in her response to changes in the work place. She would not be able to complete a normal work day without interruptions from symptoms. Her work pace is going to be poor and inconsistent. Her attention and concentration [were] found to be adequate[;] however,

> sustained attention and concentration [are] estimated to be very poor. Appropriate behavior and standards of neatness and cleanliness were observed. In the event that she is determined eligible for benefits, it is recommended that these be co-managed by a payee.

(R. 291)

Dr. Notch performed a Psychiatric Review Technique of Henrich on June 15, 2000. (R. 262-72) He found Henrich to have severe, medically determinable impairments of pain disorder, and depressive disorder not otherwise specified. He gave her a GAF of 50, and found her to be moderately restricted in the activities of daily living and maintaining social functioning. He found she frequently would have deficiencies of concentration, persistence or pace, resulting in a failure to complete tasks in a timely manner. He opined she could "do one or two step work like activities," but "could not maintain at more complex activities." (*Id.*)

The next medical evidence of record is Henrich's return visit to see Dr. Pruitt on May 14, 2001. She was complaining of chronic back and left leg pain. Dr. Pruitt ordered an EMG/NCS study of her left lower extremity, and gave Henrich samples of Skelaxin to try. (R. 293) Henrich returned for follow-up on June 1, 2001, and learned the EMG/NCS studies were unremarkable. Dr. Pruitt recommended an MRI to find out what is going on in Henrich's back, and he gave her a prescription for Ultram. The doctor's notes indicate Henrich was going to try to get financial assistance through local agencies to pay for the MRI, and if she was unsuccessful, then the doctor would send her to the University of Iowa for evaluation. (R. 292) No further evidence appears in the Record as to whether Henrich ever had the MRI, or what the results were.

3. Vocational Expert's Testimony

VE William Tucker prepared a summary of Henrich's past relevant work, which he listed as follows: (1) nurse's aide; "Assist in patient care as directed by nursing/medical staff"; semi-skilled; medium, per D.O.T./SSA regulations; "very heavy" as performed by Henrich; (2) grounds keeper, "Maintain the grounds of an establishment"; semi-skilled; medium per the regulations; light as performed by Henrich; (3) hospital cleaner; "clean hospital rooms"; unskilled; medium, both per the regulations and as performed by Henrich; and (4) poultry dresser; "Perform turkey dressing work"; unskilled; light, both per the regulations and as performed by Henrich. (R. 70, 256)

The ALJ asked the VE the following hypothetical question, considering someone 45 to 46 years of age, with a ninth grade education, trained as a certified nurse's aide, and with Henrich's work history:

> Let us assume that she has been suffering from low back pain since an injury in 1996, at the nursing home. That she also has experienced headaches, over the period of time. That she subsequently worked approximately three to four years after her initial injury. That she also has been diagnosed as having borderline intellectual functioning. Difficulty with reading, can write. Difficulty with spelling and difficulty, she said with any type of mathematics. Not being able to use a calculator. Let us assume that she would be restricted to unskilled, sedentary, light type of work, where she could alternatively sit, stand. With an occasional lift of 30 pounds. But a more frequent lift at the 10 pound basis. That sitting for 30 minutes at a time . . . or no more than a total of six hours sitting during an eight hour day with those reasonable breaks. So what kind of a job we're talking about is a job where she can alternately sit, stand and walk. Assuming that, those limitations and restrictions, and that she would not have to do any extreme squatting, bending, or that type of thing. Assuming, assuming those limitations and restrictions, would that person be able to do any of the jobs you've listed [her] as having done in the past?

(R. 71-72) The VE replied the hypothetical claimant would not be able to return to any of her past work, noting the nurse's aide and hospital cleaner positions would exceed the exertional limitations of the hypothetical, and the grounds keeper and poultry processing jobs would require the claimant to stand more than allowable. (R. 72)

The ALJ then asked if any jobs exist that the hypothetical claimant would be able to perform. The VE replied the claimant could work as a bench-type assembler, if she could alternate sitting and standing; a marker or labeler; and an inspector and hand packager. The VE noted substantial numbers of each of these types of jobs exist both in Iowa and nationally. (*Id.*)

4. The ALJ's conclusion

The ALJ found Henrich had "engaged in substantial gainful activity up to at least September, not the first, 2000," and had not engaged in substantial gainful activity since that time. (R. 23, ¶ 2) The ALJ determined his finding in connection with Henrich's prior disability application had been erroneous in giving Henrich "'great benefit of doubt' when being found not to have performed substantial gainful activity subsequent to March 23, 1996." (R. 13) In reaching this conclusion, the ALJ noted Henrich had continued to work after that time, consistent with limitations imposed by her doctors, and had continued to earn about the same amount of money as she had earned prior to the injury. He further noted Henrich had not left work as either a nurse's aide or grounds keeper due to physical impairments. He observed she had quit her job at the nursing home due to financial concerns after her husband's job location changed, and her "allegations of weakness or a lack of stamina resulting in her discontinuance of work activity mowing lawns may have related more to deconditioning as opposed to the presence and severity of any physical impairment, including pain[.]" (R. 14; *see* R. 14-16)

The ALJ found Henrich had "severe impairments consisting of borderline intellectual functioning and complaints of low back pain with radiculopathy down the left lower extremity, but with only minimal laboratory and clinical abnormalities being present based on numerous tests and exams." (R. 24, ¶ 3) However, he further found her impairments did not, singly or in combination, meet the level of severity required by the application regulations. (*Id.*)

Regarding the credibility of Henrich's subjective complaints, the ALJ noted the following:

> Testimony of the claimant as to the presence and severity of various impairments alleged, including pain, with resultant functional limitations was exaggerated, generally not credible, and not substantially supported by medical evidence and opinion in record considered in its entirety. Testimony of the claimant's husband as to his observations of the claimant is accepted as sincere, but does not support a finding of disability within the meaning of the Social Security Act based on the residual functional capacity found by the undersigned in this decision.

(R. 24, ¶ 4)

In discussing his reasons for finding Henrich's testimony not to be credible, the ALJ first discussed inconsistencies between Henrich's testimony regarding her work activity, her husband's testimony, and the record evidence. Henrich and Steve both testified Henrich's "performance of daily activities [is] consistent with work activity performed at the sedentary to light exertional level, at most," (R. 18) yet the record indicates Henrich continued to perform substantial gainful activity "on a regular and sustained basis up to at least September, not the first, 2000, at the light exertional level." (R. 19) He further noted Henrich did not seek any type of medical treatment between May 1997 and May 2001, despite the fact that she was covered by health insurance through September 1998. She still failed to seek medical treatment even after filing her current application for benefits. The

ALJ concluded, "it was not until the fall of 2000 that [Henrich's] lack of insurance and lack of finances may reasonably be argued to have prevented [her] from seeking medical care and treatment for complaints of back and lower extremity pain." (*Id.*)

The ALJ also opined that Henrich's worker's compensation claim could have influenced her "alleged pain and functional limitations attributable to [her] injury at that time." (*Id.*) And he discussed ways in which the medical evidence does not support Henrich's subjective pain complaints. (R. 20-21)

The ALJ rejected Dr. Mayhew's most recent diagnosis of pain disorder with physical and psychological factors because "said diagnosis was clearly premised upon full credibility being given [Henrich's] assertions of back pain, left lower extremity pain, and severe headaches," and the ALJ found those subjective complaints not to be credible. (R. 17) He rejected Dr. Creswell's opinion regarding Henrich's functional limitations because it was "solely on the basis of [Henrich's] symptomatic complaints being accepted as fully credible despite laboratory test results and clinical findings being to the contrary." (R. 21)

The ALJ similarly rejected the opinions "of the state agency physicians as to the presence or severity of mental impairments imposing functional limitations upon [Henrich's] ability to perform basic work-related activities on a regular and sustained basis." (R. 18; *see* R. 22) He noted this conclusion was buttressed by the fact that Henrich "has never sought medical treatment, or used medications, for the treatment of depression, nor undergone any counseling for reported depressive symptoms." (*Id.*)

The ALJ also rejected the VE's assessment of Henrich's residual functional capacity. The ALJ found Henrich retains the residual functional capacity to perform her past relevant work as a groundskeeper and a nurse's aide, both as generally performed in the national economy and as actually performed by Henrich. (R. 24, ¶¶ 6 & 7) He found Henrich "possesses the residual functional capacity to perform work-related activities other than lifting or carrying weight at the heavy exertional level; performing complex or detailed

work activity; and performing work activity requiring academic skills." (R. 24, ¶ 5) The ALJ concluded Henrich is not disabled, and is not entitled to DI benefits. (R. 24-25)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is

considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *accord Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)).

Step five requires that the Commissioner bear the burden on two particular matters:

> In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added); *accord Weiler v. Apfel*, 179 F.3d 1107, 1110 (8th Cir. 1999) (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work,

and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

B. The Substantial Evidence Standard

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra*, 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra*, 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell, id.; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health &*

Human Serv., 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does "not reweigh the evidence or review the factual record *de novo.*" *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); *accord Pearsall*, 274 F.3d at 1217; *Gowell, supra.*

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v.*

Shalala, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

Henrich argues the ALJ erred in rejecting the findings and opinions of Drs. Creswell, Follows, and Mayhew, which Henrich claims support her application for benefits. (Doc. No. 10) The foundational question here is the underlying reason the ALJ rejected those doctors' opinions; *i.e.*, the ALJ's determination that Henrich's subjective complaints were not credible. Because the ALJ found Henrich's subjective complaints not to be credible, he discounted all the opinions – both from the doctors and from the VE – that relied to any extent on those subjective complaints. In so doing, the court finds the ALJ failed to conduct a proper *Polaski* analysis that gave appropriate consideration both to Henrich's subjective complaints and to the expert opinions of record. Further, the ALJ based his decision on Henrich's current application largely on the ALJ's decision with

regard to Henrich's previous applications, rather than viewing the present application independently.

Although the prior applications are not before the court for review, the court notes the record contains substantial evidence to support the conclusion that Henrich likely was not disabled prior to 1999. However, even doctors who examined Henrich previously, in connection with prior applications for benefits, noted a worsening of her symptoms since their prior examinations. In particular, Dr. Mayhew examined Henrich at the request of DDS on three separate occasions, in December 1997, April 1998, and May 2000. On the first occasion, he gave Henrich a GAF rating of 61, indicating mild symptoms or some difficulty with social and occupational functioning. He opined she would have a marginal ability to use good judgment and respond appropriately to changes in the workplace, and her ability to maintain attention, concentration, and pace was somewhat variable.

Four months later, when Dr. Mayhew reexamined Henrich on behalf of DDS, his evaluation of her basically was unchanged. At that time, he gave her a current GAF rating of 64, indicating some improvement in her symptoms and ability to function, but still in the range indicating some difficulty with social and occupational functioning.

In his examination of Henrich two years later, Dr. Mayhew reached different conclusions. He diagnosed her with a pain disorder with both physical and psychological factors; a depressive disorder, not otherwise specified; low back and leg pain; migraine headaches; and other "medical concerns." At this time, he gave her a current GAF rating of 50, indicating a serious impairment in social and occupational functioning. Dr. Mayhew found Henrich "would not be able to complete a normal work day without interruptions from symptoms. Her work pace is going to be poor and inconsistent . . . [and] sustained attention and concentration [are] estimated to be very poor." (R. 291)

Dr. Notch's psychiatric evaluation of Henrich on June 15, 2000, was consistent with Dr. Mayhew's evaluation. Dr. Notch also assessed Henrich's GAF at 50, and he found she

frequently would have deficiencies of concentration, persistence or pace. He opined that "[f]rom a mental standpoint only," Henrich could "do simple one or two step work like activities," but she had "quite poor" sustained attention and concentration and she would be unable to perform more complex activities. Dr. Notch noted Henrich "might have some problems interacting appropriately with supervisors, coworkers, and the public," and "might have some problems with judgment and handling changes at work." (R. 271)

These psychological findings, coupled with the medical evidence that Henrich has suffered from chronic pain for a lengthy period of time, and doctors' opinions that something, as yet largely undetermined, is going on in Henrich's back, constitute substantial evidence to support Henrich's current disability claim. The ALJ improperly substituted his judgment for that of the experts, and failed to provide adequate justification for doing so. Accordingly, the court finds the record does not contain substantial evidence to support the ALJ's decision.

V. CONCLUSION

For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[5] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that judgment be entered in favor of Henrich[6]

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[5]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

[6]If final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.

and against the Commissioner, and that this case be **reversed and remanded** to the Commissioner for the calculation and award of benefits.

IT IS SO ORDERED.

DATED this 1st day of May, 2003.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT